Supreme Court, U.S.
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NO. 92-

92-1814

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

DANNY LEE HILL,
Petitioner,

v.

PITT-OHIO EXPRESS, INC.,
a Pennsylvania corporation,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the
Fourth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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November 5, 1992

48pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the plaintiff established a prima facie case presenting evidence of "same or similar conduct" sufficient to avoid judgment notwithstanding the verdict or a directed verdict when nonmembers of the protected classes admitted under oath conduct by themselves which was the same or similar to that allegedly committed by the plaintiff and were not discharged for such conduct?

2. Whether the plaintiff's state claim and prima facie case regarding his health and/or handicap "as being perceived by his employers" is sufficient by itself to uphold the jury's verdict based on the testimony of the plaintiff and the employer's terminal manager, Fred Terwilliger?

3. Whether the jury are the final judges of what constitutes "same or similar conduct" when hearing evidence in a discrimination case under the West Virginia Human Rights Act?

4. Whether West Virginia's state regulations setting forth West Virginia's numerical point system of penalties for driving/traffic violations definitively quantifies the seriousness of alleged driving/traffic violations so as to bind the Court and the jury and create a basis for inferring "same or similar conduct" in a federal discrimination case?

5. Whether the unsupported and uncorroborated testimony of Fred Terwilliger, defendant's terminal manager and a witness adverse to the plaintiff, that other employees who were members of the protected class engaged in allegedly "same or similar conduct" and were discharged for it can be ruled credible by the trial judge as a matter of law when the jury found such testimony not credible?

6. Whether an employee's choice to bypass an employer's nonbinding internal grievance procedure after receiving notice of his termination by the employer's home office when such grievance procedure is not required by any collective bargaining agreement, can be used as evidence against that employee when the employee has timely filed a complaint with the West Virginia Human Rights Commission protesting his discharge?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

No. 92-

DANNY LEE HILL,
Petitioner,

v.

PITT – OHIO EXPRESS, INC.,
a Pennsylvania corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays for a writ of certiorari to review a decision of the Fourth Circuit District Court of Appeals.

OPINIONS BELOW

United States District Court of West Virginia, Judge J.T. Copenhaver, Jr., Judgment Order entered in favor of the defendent on 12/26/91

United States Court of Appeals for the Fourth Circuit, Before Wilkins, Hamilton, and Williams, Circuit Judges, Affirming the decision of the District Court on 8/7/92.

JURISDICTION

Jurisdiction is based on the entry of the judgement entered by the Fourt Circuit Court of Appeals on August 7, 1992, based on the Order denying rehearing and suggestion en banc under the statute of the Discretionary Right of Appeal from the Fourth Circuit Court of Appeals or from any federal circuit court of appeals to the United States Supreme Court on constitutional Provisions, Statutes and Regulations.

CONSTITUTIONAL PROVISION INVOLVED

Section 2 of the Article III of the Constitution of the United States provides, in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and the Treaties made, or which shall be made, under their Authority . . .

STATEMENT OF THE CASE

The plaintiff, Danny Lee Hill, was employed by the defendant from April 14, 1986, through October 27, 1989. On October 27, 1989, the plaintiff was verbally informed by his supervisor that he was fired. By letter dated November 1, 1989, the plaintiff received a formal letter from the defendant's directors notifying him of his termination from employment.

On January 9, 1990, the plaintiff filed a formal complaint with the West Virginia Human Rights Commission against the defendant corporation alleging age and/or health

discrimination. Plaintiff specifically alleged that his termination was discriminatorily motivated and that he was a member of two protected classes, i.e., he was over 40 years old and he had suffered a heart attack approximately three months before his wrongful termination. After 180 days, the West Virginia Human Rights Commission found probable cause to support the plaintiff's allegations and issued a "right-to-sue" letter, persuant to West Virginia Code Section 5-11-13(b).

The plaintiff then filed a formal civil complaint in the Kanawha County Circuit Court in Charleston, West Virginia, on October 9, 1990. The complaint alleged both age and health/handicap discrimination under both state and federal statutes. The defendant then moved to remove the civil action from the state circuit court to the federal district court in the Southern District of West Virginia.

After discovery the defendant made motions for summary judgment seeking to dismiss plaintiff's complaint against defendant corporation and against defendant Ron Uriah. The Court denied the motion as to the defendant corporation, but granted the motion as to the individual defendant Ron Uriah as a matter of law on the grounds that he had not been named as a party to plaintiff's original complaint to the West Virginia Human Rights Commission. Thereupon the case proceeded to a jury trial in the federal district court.

The first trial scheduled for October 21, 1991, ended in a mistrial due to confusion regarding the admissability of evidence on a trial ruling stemming from defendant's motion in limine. The second trial commenced on November 7, 1991, and was concluded by a jury verdict for the plaintiff awarding compensatory damages in the amount of $70,000.00 on November 8, 1991.

At the conclusion of Plaintiff's case the defendant made motions for directed verdict, **the court denied defendant's motion as to the state health/handicap claim** and reserved ruling on the remaining motions until the conclusion of all evidence. The court issued its ruling granting defendant's remaining motions and overturning its prior ruling on the state health/handicap claim in the form of a final Judgment Order entered on December 26, 1991.

The plaintiff appealed to the Fourth Circuit, which affirmed the lower court's rulings by Order entered August 7, 1992.

This is an appeal of that Order.

REASONS FOR GRANTING THE WRIT

The Plaintiff met his burden to prove discrimination in that he has established the prima facie elements of: being a member of a protected class; being qualified for continued employment; satisfying normal job requirements; being fired where a non-member of a protected class co-worker with comparable qualifications and allegations of poor performance was not fired. *McDonnell Douglas Corporation v. Green*, 411 U.D. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), as tailored by *Hughes v. Chesapeake and Potomac Telephone Company*, 583 F. Supp. 66, 69, 33 F.E.P. 1651, 1654 (D.D.C. 1983), and *Burdette V. FMC Corp.*, 566 F. Supp. 808, 815, 32 F.E.P. 428, 432 (n.D. W. Va. 1983).

The West Virginia Supreme Court of Appeals held in *State ex rel. Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc.*, _____W. Va._____, 329 S.E. 2d 77, 85 (1985) that:

> "(A) complainant in a disparate treatment, discriminatory discharge case brought under the West Virginia Human Rights Act, *Code*, 5-11-1, *et seq.*, may meet the initial *prima facie* burden by proving, by a preponderance of the evidence, (1) that the complainant is a member of a group protected by the Act; (2) that the complainant was discharged, or forced to resign, from employment; and (3) that a nonmember of the protected group was not disciplined, or was disciplined less severely, than the complainant, though both engaged in similar conduct."

The Plaintiff has successfully established the first element of prima facie case of discriminatory discharge in that he is handicapped through cardiac illness and over fort y years of age; therefore, a member of a protected class under the acts. Specifically, the plaintiff is a member of the protected age class under both state and federal law. See, West Virginia Code Section 5-11-3(q) and 29 U.S.C. Section 621 *et seq.* He is also a member of the protected health/ handicap class under state law. See. West Virginia Section 5-11-3(t); Title 77 Legislative Rules, West Virginia Human Rights Commission series I, Section 2.8 *et seq;* and, *Ranger Fuel v. West Virginia Human Rights Commission*, 376 S.E.2d 154 (W. Va. 1988) (employer's perception of employee's handicap is sufficient to satisfy the definition of handicap discrimination). The second element of Plaintiff's prima facie case was that he was discharged from employment by the Defendants. Neither of the first two elements of the Plaintiff's prima facie case are denied or contested by the Defendant. The third element is successfully established by the Plaintiff, through testimony and evidence presented through memoranda and letters.

The last element of the Plaintiff's prima facie case, whether a nonmember of the protected class was treated differently for similar conduct, is the basis for the judgment order. Defendants did not fire non-members of a protected class who received actual speeding convictions, which would seem far more serious than an unsubstantiated hearsay report of alleged 7-mile per hour speeding and which, in fact, is numerically more serious under the regulations establishing the "point system" of the West Virginia Department of Motor Vehicles, West Virginia Code 17C-5-3, and West Virginia Department of Motor Vehicles Regulations 91 C.S.R. 5.

Further, under West Virginia's "point system" all of the plaintiff's alleged improper driving, as quantified, rates a mere two (2) points, whereas all other witnesses called had quantified violations under the same "point system" totaling six (6) points or more. A six (6) point violation is the equivalent of reckless driving under West Virginia law and *none* of those non-members were terminated; thus unequivocally establishing a clear numerical standard of "same or similar conduct" and also establishing numerically disparate treatment of the plaintiff thereunder.

The defendant did not adhere to its articulated policies as to traffic/safety violations and meted out discipline on an "if we like you this week" basis, which was successfully established by the testimony of other employees, particularly the letter written to the traffic court on behalf of employee Gary Breeden by his supervisor after he received a traffic citation in Kentucky.

Plaintiff has merely to show the prima facie elements of discrimination, at which time the burden shifts to the Defendant to rebut with articulated nondiscriminatory reasons for its actions. See *McDonnell, supra.* The Plaintiff then has to show by a preponderance of the evidence that

Defendant's reasons are "merely a pretext for the unlawful discrimination." *Shepherdstown V.F.D. v. W. Va. Human Rights Comm'n*, _____W. Va._____, 309 S.E. 2d 342 (1983). However, here the Plaintiff's proof "require(s) something less than proof of actual discriminatory intent or motive." *Zuniga v. Klegerg County Memorial Hospital*, 692 F. 2d 986, 30 FEP 651 at 652 (5th Cir. 1982). To show pretext, the Plaintiff must merely show that the employer's justification is suspect or lacks credence. Pretext can also be shown by circumstantial, as well as direct, evidence. *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 103 S. Ct. 1478, 75 L.Ed. 2d 403 (1983). A nexus to fulfill the pretext requirement can be inferred between the alleged adverse action to the plaintiff and the plaintiff's protected group status. *Ortiz v. Ciba-Geigy Corp.*, 87 F.R.D. 723, 724-25, 23 F.E.P. Cases 1337.

The Court in issuing its final Judgment Order began with the underlying premise that the defendant's proffered legitimate business reason for the plaintiff's termination of employment is more credible than the plaintiff's evidence showing the employer's reason to be mere pretext. The Court then impermissibly engages in the process of weighing the relative credibility of witnesses who testified at trial. The Court heavily relies in its finding on the testimony of the defendant's supervisor, Fred Terwilliger, implying that the Court found his testimony to be credible, when, in fact, he was demonstrably not a credible witness and the jury obviously found him incredible.

Further, the Court relies heavily on Terwilliger's totally uncorroborated and self-serving testimony that two other employees—both non-members of a protected class—were terminated for the same conduct for which the plaintiff

allegedly was discharged. This uncorroborated testimony **should not be and was not given any weight by the jury.** In

Smith v. Springs, 1991 U.S. App. LEXIS 27221, the Court found that the defendant's self-serving testimony that non-members of the protected class were treated the same as the plaintiff without offering any corroborating evidence or calling the adversely affected employees as witnesses lacked credibility. **Further, the Court found that the jury could find from this lack of corroborating evidence and from** weighing other evidence offered at trial that the defendant lacked good faith and credibility in terminating plaintiff's employment. The same is true in this case.

When the district court steps into the role of the jury and concludes that the defendant's proffered reason for discharge is more credible than the plaintiff's, the court is finding as a fact what constituted the defendant's motivation, which impermissable. *Taylor v. Home Ins. Co.*, 777 F.2d 849, 854 (4th Cir. 1985). *Taylor* goes on to state that when the evidence is in sharp conflict, as it was in this case, and the determination of discrimination rests solely on the credibility of witnesses the verdict of the jury should not be set aside.

The courts have further realized that the disparate treatment test must be applied as the facts present themselves. Disparate treatment can be proved by showing the undeniably discriminatory impact rather than by attempting to prove a subjectively willful violation. *Springs*, supra. If the plaintiff can demonstrate that, as between the plaintiff's protected status (age and health) and defendant's proffered reason for discharge, plaintiff's status

"was prevail." *Herold v. Hajoca*, 864 F.2d 317, 319 (4th Cir. 1988). Again, this is a question for the jury and a determination that only the jury can make.

Finally, the judgment order attempts to reevaluate the "same or similar conduct" offered as evidence. The conduct of the witnesses was alleged to be the same or similar in that all were traffic and/or safety violations. Regardless of the court's efforts to discredit the disparity in treatment the disparity obviously existed. As between the past work history of all testifying employees, the plaintiff's was clearly the best. He had received no citations from police officers and no moving violation convictions in the preceding fifteen years and had received three safe driving awards in as many years, while the other employees in the non-protected classes had received as alittle as one safe driving award in six years and several had actual convictions for on-the-job moving violations. *Williams v. Sonoc Products Co.*, 33 F.E.P. 1200.

The court erred in refusing to allow the introduction of a memorandum issued by the defendant corporation on October 30, 1989. This memorandum was issued three days after plaintiff was informed of his termination, but two days before he received his formal written notice of termination. The court ruled the document to be irrelevant, but it is extremely relevant to the issue of pretext. This memorandum changed the previous policy memorandum dated April 10, 1989, regarding punishment for "reckless driving observed by a safety patrol" from "suspension, subject to termination" to simply "suspension *or* termination." Further, the new memorandum made a traffic conviction for speeding 20 miles over the speed limit

automatic termination, yet, two weeks after its issue employee Wayne Norman received a conviction for going 20 miles over the company limit of 55 mph and received only a suspension. If ths plaintiff had been permitted to introduce this document into evidence the plaintiff's evidence proving pretext would have been even stronger, as the defendant was clearly trying to justify its discriminatory actions toward the plaintiff by changing declared company policy after the fact.

CONCLUSION

This case properly went to the jury. The jury properly weighed the evidence presented to it during the course of the two-day trial. The jury properly assessed the credibility of the witnesses for both the plaintiff and the defendant. The most difficult part of a discrimination case is determining if the defendant had a discriminatory motive in taking adverse action against the plaintiff. The Courts have recognized that there is rarely a smoking gun and that inferences are allowed; however, the jury is the sole authority on those inferences.

The plaintiff put on sufficient evidence regarding the nexus between his age and health and his subsequent termination to support the jury's findings. Until his heart attack the plaintiff received annual safe driving awards and had no traffic citations or convictions in fifteen years. From the hospital room to his final job termination in less than 90 days, the relationship changed between the plaintiff and his supervisor who withheld the dock dispatcher's job, increased plaintiff's duties and finally replaced the plaintiff with a much younger employee. This constitutes sufficient

evidence to form the necessary nexus to establish discrimination. The district court cannot now usurp the jury's prerogative and overturn the verdict since the evidence is more than sufficient to support the jury's verdict.

Sympathy could not be a hidden factor in the jury's findings, as they did not award the plaintiff any damages for emotional distress or humiliation. The special interrogatories to the jury provided a "sympathy" option and they chose to award only back pay and compensatory damages in the total amount of $70,000.

Therefore, the plaintiff respectfully requests that this Court grant appelant's Petition for Writ of Certiorari and that the final decision of the Fourth Circuit Court of Appeals affirming the district court's final Judgment Order granting the defendant's motion for judgment *non obstante verdicto* be reversed and that an order be entered upholding the jury's verdict for the plaintiff and awarding the plaintiff back pay, compensatory damages, front pay/reinstatement, attorney's fees and costs, with interest from the date of discharge.

Respectfully submitted,

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By Counsel

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November 5, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-1138

DANNY LEE HILL,
Plaintiff-Appealant,

v.

PITT-OHIO EXPRESS, INC.,
a Pennsylvania corporation,
Defendant-Appellee,

and

RONALD D. URIAH,
Defendant.

Appeal from the United States District Court
for the Southern District of West Virginia,
at Charleston
(Civil Action 90-1049-2)

Argued: July 7, 1992

Decided: August 7, 1992

Before: Wilkins, Hamilton, and Williams, Circuit Judges.

unpublished

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Danny Lee Hill,
Plantiff-Appellant,
v.
Pitt-Ohio Express, Inc., a Pennsylvania corporation,
Defendant-Appellee,
and
Ronald D.Uriah,
Defendant.

No. 92-1138

Appeal from the United States District Court
for the Southern District of West Virginia, at Charleston.
John T. Copenhaver, Jr., District Judge.
(CA-90-1049-2)

Argued: July 7, 1992

Decided: August 7, 1992

Before WILKINS, HAMILTON, and WILLIAMS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Steven L. Miller, MILLER & REED, L. C., Cross Lanes, West Virginia, for Appellant. **ON BRIEF:** Deborah E. Reed, MILLER & REED, L. C., Cross Lanes, West Virginia, for Appellant.

Michael J. Del Guidice, CICCARELLO & DEL GUIDICE, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Plantiff-appellant, Danny Lee Hill, alleges that the decision of his employer, Pitt-Ohio Express, Inc., to terminate him was based on age and health/handicap discrimination. The district court entered a directed verdict for Pitt-Ohio. Finding no error, we affirm.[1]

1

In 1986, Hill was hired by Pitt-Ohio as a truck driver. In early July 1989, he suffered a heart attack and returned to work in late July or early August 1989. In October 1989, Hill was asked by his supervisor, Fred Terwilliger, to make an emergency run from Charleston to Huntington, West Virginia.

During this emergency run, Hill's driving habits were observed by Sherry Newkirk, an employee of Safety Service, Inc.[2] Newkirk's observations included: (1) Hill

[1]Appellant has filed a"Motion for Leave to File Supplemental Reply Brief." In this motion, appellant also asks us to impose sanctions on appellee pursuant to Fed. R. Civ. Proc. 37 for failing to comply with appellant's discovery requests in the district court. We grant the Motion for Leave to File Supplemental Reply Brief, but have no jurisdiction to address the merits of the Motion for Sanctions made pursuant to Fed. R. Civ. Proc. 37, Fed. R. Civ. Proc. 1; *cf. Cooter & Geil v. Hartmarx Corp.*, 110 S. Ct. 2447, 2461-62 (courts of appeals are without jurisdiction to impose Fed. R. Civ. Proc. 11 sanctions).

[2]Safety Service, Inc. is a road safety patrol, an independent company hired by trucking companies to observe the driving habits of truck drivers for insurance purposes.

was travelling at seventy-three miles per hour in a sixty-five mile per hour zone in conditions of light rain and moderate traffic, (2) he followed traffic at a distance of twenty feet for approximately three miles before passing, and (3) he did not use his left turn signal upon changing lanes. Subsequently, Newkirk filed a Driver's Violation Report delineating the above transgressions with Pitt-Ohio. As a result of this report and pursuant to company policy, Hill was terminated on October 27, 1989, for reckless operation of a company truck.[3] Hill acknowledged that operation of a vehicle as described in the Newkirk report would have been dangerous and reckless driving. He also acknowledged that reckless operation of a company vehicle was cause for termination of his employment pursuant to company policy.

Hill did not deny the correctness of the Newkirk report when it was first presented to him, but simply questioned Terwilliger as to whether "four years of safe driving history didn't mean anything." Joint Appendix 47, 58. Hill later denied the correctness of the Newkirk report. Hill did not file any grievance with Pitt-Ohio nor ask the company to reconsider its decision to terminate his employment, despite the availability of a grievance procedure for resolving disputes between employees and company management.[4]

On January 9, 1990, Hill filed a formal complaint with the West Virginia Human Rights Commission against Pitt-Ohio alleging age and health/handicap discrimination. After 180 days, the West Virginia Human Rights Commission issued

[3]At the time of his termination, Hill was forty-three years of age.

[4]Compliance with an internal grievance procedure is not a prerequisite to filing a complaint with the West Virginia Human Rights Commission.

Hill a right-to-sue letter. On October 9, 1990, the plantiff filed a complaint to state court alleging age discrimination and health/handicap discrimination in violation of W. Va. Code 5-11-9,[5] and another count of age discrimination in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.* Pitt-Ohio removed the case to federal court, and the case proceeded to trial.

At the conclusion of plantiff's case, Pitt-Ohio moved for a directed verdict. The district court denied the motion as to the state health/handicap claim and reserved ruling on the state age and federal age discrimination claims. Pitt-Ohio renewed its motion for a directed verdict as to all claims at the close of all evidence and the district court reserved ruling pending the outcome of the jury verdict. The jury returned a verdict in favor of Hill, and the district court in a memorandum order, dated December 26, 1991, granted Pitt-Ohio's motion for a directed verdict on all claims. Plantiff appeals from this adverse judgment.

II

Under the ADEA and West Virginia law, plantiff has the initial burden of establishing a *prima facie* case, but once plantiff satisfies this requirement, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse employment action taken. If the defendant meets that burden, plantiff then has the burden of proving that the reason proffered by the defendant was pretextual. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973); *Conkwright v. Westinghouse Electric Corp.*, 933 F.2d 231, 234-35 (4th Cir. 1991); *Conaway v.*

[We may assume, without deciding, that plaintiff was handicapped by reason of his heart attack under West Virginia law. *See* W. Va. Code 5-11-3 (t) (1)-(3). The esolution of this issue is best left to the Supreme Court of Appeals of West Virginia.

Eastern Associated Coal Corp., 358 S.E. 2d 423, 429-30 (W. Va. 1986).[6]

We find that the district court's decision granting Pitt-Ohio's motion for directed verdict was entirely appropriate and justified in light of the absence of a scintilla of evidence that age or health/handicap discrimination played a role in Pitt-Ohio's decision to terminate plaintiff. The evidence adduced at trial made it unequivocally clear that plantiff was discharged because he was observed driving a company vehicle in a reckless manner. This conclusion is bolstered by the testimony of Terwilliger. Terwilliger testified that Steve Nester and Dennis Wiblin, who were both under forty and not handicapped, were terminated like Hill pursuant to company policy for operating a company vehicle recklessly. In short, our review of the record indicates that plaintiff failed to submit evidence that would create a genuine issue of material fact as to whether defendant's reason for discharge was pretextual or unworthy of credence. *E.E.O.C. v. Clay Printing Co.*, 955 F.2d 936,941 (4th Cir. 1992) (citation omitted); *Conaway*, 358 S.E.2d at 430. Entry of a directed verdict for Pitt-Ohio, therefore, was warranted as a matter of law. Accordingly, the decision of the district court is affirmed.

AFFIRMED

[6]Under West Virginia law, in order to establish a *prima facie* case of age discrimination, the plaintiff must establish that: (1) he is a member of a protected class, (2) he suffered an adverse employment decision, and (3) but for age, the adverse employment action would not have been taken. *Conaway*, 358 S.E. 2d at 429. Under the ADEA, in order to establish a*prima facie* case, the plaintiff must demonstrate that: (1) he is a member of the protected class, (2) he was discharged, (3) at the time of discharge, he was performing at a satisfactory level, meeting his employer's legitimate expectations, and (4) following his discharge, he was replaced by a person outside the protected class. *E.E.O.C. v. Western Electric Co., Inc.*, 713 F.2d 1011, 1024 (4th Cir. 1983).

APPENDIX B

JUDGMENT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

No.

DANNY LEE HILL,
Plaintiff,

v.

PITT-OHIO EXPRESS, INC.,
a Pennsylvania corporation,
Defendant.

(Filed Dec. 26, 1991)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

DANNY LEE HILL,
Plaintiff,

v.

PITT-OHIO EXPRESS, INC.,
a Pennsylvania Corporation,
Defendant.

Civil Action No. 2:90-1049

JUDGMENT ORDER

In accordance with the memorandum order this day entered in the above-styled civil action, it is ORDERED and ADJUDGED that the plaintiff, Danny Lee Hill, take nothing, that judgment be entered in favor of the defendant, and that the defendant be awarded its costs.

All matters in this case having been resolved, it is further ORDERED that this civil action be dismissed and stricken from the docket of the court.

The Clerk is directed to forward copies of this order to all counsel of record.

Dated: December 26, 1991

JOHN T. COPENHAVER, JR.
United States District Judge

APPENDIX C

Civil Action No. 2:90-1049

MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

DANNY LEE HILL,
Plaintiff,

v.

PITT-OHIO EXPRESS, INC.,
a Pennsylvania corporation,
Defendant.

(Filed Dec. 26, 1991)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

DANNY LEE HILL,
Plaintiff,

v.

PITT-OHIO EXPRESS, INC.,
a Pennsylvania corporation,

Defendant.

Civil Action No. 2:90-1049

MEMORANDUM ORDER

This matter is before the court on the motion of the defendant, Pitt-Ohio Express, Inc., for directed verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure.

I. Background

On November 7 and 8, 1991, this civil action was brought on for trial. At the close of plaintiff's case-in-chief, the defendant moved the court for a directed verdict on plaintiff's claims of age and handicap discrimination, asserting that plaintiff had failed to introduce sufficient evidence to prevail on either claim was a matter of law. The defendant renewed its motion for directed verdict at the close of all evidence.

With regard to the plaintiff's age discrimination claim, the defendant specifically argued that the plaintiff failed to introduce any evidence to satisfy the third element of his *prima facie* case, namely that, "but for his age, he would not have been discharged." Tr. 140. Similarly, the defendant also argued that the plaintiff failed to introduce any evidence to support a finding that he would not have been discharged but for the fact that he had suffered a heart attack approximately three months prior to his termination.[1]

The plaintiff has contested the defendant's motion for directed verdict by arguing that the testimony offered by four Pitt-Ohio employees, two of whom were younger than plaintiff and none of whom had sustained heart attacks, was sufficient to satisfy his *prima facie* case on both his age and handicap claims. Plaintiff's argument, in essence, is that alleged disparity between the treatment accorded to invididuals in the non-protected classes and the treatment accorded the plaintiff is sufficient to have supported a finding that the plaintiff's discharge was, as he contents, discriminatorily motivated.

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[1]Also with respect to the plaintiff's handicap claim, the defendant argued as an initial matter that the plaintiff failed to introduce any evidence to establish that he meets the definition of "handicapped" under West Virginia law. According to defendant, no evidence was proffered to show that the plaintiff has a mental or physical impairment which substantially limits one or more of his major life activities.

The court denied the defendant's motion in that regard, inasmuch as a 1989 amendment to W. Va. Code 5-11-2 reflects showing the existence of such an impairment, that the plaintiff has a record of such impairment, or is regarded as having such an impairment. *See* W. Va. Code 5-11-3(t)(1)-(3).

As noted previously, in ruling on the matters raised by the defendant's motion for directed verdict, the court denied the defendant's motion pertaining to the handicap discrimination claim at the conclusion of all of the evidence insofar as it was predicated solely upon the argument that the plaintiff did not meet the definition of "handicapped" under West Virginia law. The court reserved ruling on the remaining portions of the defendant's motion pertaining to the plaintiff's age and handicap claimes pending submission to the jury.[2]

On November 8, 1991, the jury returned a verdict in this matter in favor of the plaintiff and against the defendant in the amount of $70,000, being comprised of damages for lost wages in the amount of $40,000, and incidental damages in the amount of $30,000. The court now reviews that verdict in light of the evidence adduced at trial in resolving the defendant's motion for directed verdict.

II. *Summary of Evidence*

The plaintiff, Danny Lee Hill, testified at the trial of this action that he believed that his discharge from Pitt-Ohio occurred not as a result of an adverse safety report which was received and allegedly relied upon by the defendant in discharging him, but rather as a result of his age and the fact that he had suffered a heart attack approximately three months prior to his termination.

Hill was hired by Pitt-Ohio in approximately 1986. He was forty years old and already a member of the protected class

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[2]Submission to the jury was, pursuant to Rule 50(b), subject to a later determination of the legal questions raised by the defendants remaining motion.

for age discrimination at the time of his hire. He was forty-three at the time of his discharge in October, 1989.

Hill testified that he had never received any speeding violations while operating Pitt-Ohio vehicles prior to his termination in October, 1989. He also testified that he had received safe driving recognition by the defendant on four occasions between June, 1988, and March, 1989. Hill acknowledged having been involved in one accident in a Pitt-Ohio vehicle in late, 1988 or early, 1989, in which he "clipped" a mirror on one of the company's trucks. An accident report was filed with the company regarding the accident and Hill received a letter from the defendant's safety director, Ron Uriah, advising him that if he continued his safe driving record, the accident would not be counted as a "chargeable" one.

On July 3, 1989, Hill suffered a heart attack which required that he be hospitalized for approximately twelve to thirteed days. Following his discharge from the hospital, Hill also took additional time to recuperate before his physicians released him to return to his work as a truck driver for the defendant.[3] In addition to having received medical clearance from his treating physicians, Hill also submitted to a Deparment of Transportation physical examination at the request of the defedant upon his return to work. To his knowledge, Hill testified, the DOT physical revealed no problems which would preclude him from returning to his employment as a truck driver.

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[3]Although it is not entirely clear from the evidence, it appears that the plaintiff returned to his position with Pitt-Ohio sometime in late July or early August, 1989.

On October 18, 1989, Hill had completed his regular "city route" in Charleston, West Virginia, when he was asked by the defendant's terminal manager, Fred Terwilliger, to make an additional trip to Huntington, West Virginia. Hill ackowledged that he did not really want to make the trip because the request did not come until approximately 3:00 p.m., and because the customer who would be receiving the delivery had been upset on prior occasions if deliveries arrived late. Nonetheless, according to Hill, he acquiesced in Terwilliger's request and made the trip to Huntington.

On October 27, 1989, Hill was informed by Terwilliger that he had been instructed by company officials to terminate his employment. The plaintiff was advised that the reason for the termination was the reckless operation of a company vehicle. At the time of his termination, Hill was provided a document entitled "drivers Violation Report" and was told that the information contained in the report formed the basis for the company's decision to discharge him. The report was prepared by Sherry Newkirk, an employee of Safety Services, Inc.[4] The report described observations allegedly made by Newkirk of the plaintiff's operation of the Pitt-Ohio vehicle while he was enroute to Huntington during the afternoon hours of October 18, 1989.

The Newkirk report reflected Ms. Newkirk's observation that the plaintiff was, *inter alia*, traveling at seventy-three miles per hour in a sixth-five mile per hour zone in light rain and moderate traffic. Newkirk also observed that the vehicle being driven by the plaintiff was following traffic

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[4]According to Newkirk, Safety Services, Inc., is a private company retained by trucking industry employers to observe and report upon the safety practices of employee drivers. *See* TR. at 160-61.

within a distance of twenty feet for an approximate distance of three miles before passing, and was not using the left turn signal while making lane changes.[5] The plaintiff acknowledged that, had he driven the Pitt-Ohio vehicle in the manner described in the Newkirk report, such conduct would have been dangerous and constituted reckless driving. He also acknowledged that he was aware that if he operated Pitt-Ohio's vehicles in a reckless manner, he could be discharged from his employment.

Hill stated that, after being presented the Newkirk report, he questioned Terwilliger as to whether "four years of safe driving history didn't mean anything." He did not state, however, that he had protested the report's accuracy at the time it was presented to him and he was advised of the company's decision to terminate his employment on the basis of the report. *See* Tr. at 38. Hill also acknowledged in his testimony at trial that he did not file any grievance with the company nor ask the company to reconsider its decision to terminate his employment, despite the availability of a grievance procedure for resolving disputes between employees and company management.[6]

In addition to his own testimony, the plaintiff introduced the testimony of four Pitt-Ohio employees in an effort to show a disparity of treatment accorded to non-members of

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[5]The Newkirk report was admitted into evidence as defendant's exhibit 3, except that the report was not admitted for the truth of the matter asserted with regard to the specific speed of the plaintiff's vehicle.

[6]The parties do not dispute that there was no mandatory grievance procedure which the plaintiff was required to follow in order to maintain this civil action.

the protected class and the treatment accorded the plaintiff. This evidence, plaintiff contends, is sufficient to establish circumstantially that he would not have been discharged but for his age and/or handicap.[7]

Two of plaintiff's witnesses on the issue of disparate treatment are less than forty years of age and neither has suffered a heart attack. The first such witness, who falls within the non-protected class for both age and handicap, was Paul Norman. Mr. Norman is presently twenty-six years old and has been employed by Pitt-Ohio for six years. He began working for the defendant in 1985, the year prior to the plaintiff's hire. Following the plaintiff's termination in October, 1989, Norman took over the "city route" in Charleston, West Virginia, which had been driven by the plaintiff prior to his discharge.

Norman testified that, during his tenure with Pitt-Ohio, he has received one speeding ticket for going forty-two miles per hour in a twenty-five mile per hour zone. The ticket was turned in to the company. Norman did not receive a warning or suspension from the defendant for having received that ticket. No evidence was proffered by the plaintiff in order to establish the date upon which Norman received his ticket, or whether the fact that he did not receive a warning or suspension was inconsistent with

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[7]Also testifying on behalf of plaintiff was his testing cardiologist, Dr. Steven McCormick. Dr. McCormick testified, *inter alia*, that despite Mr. Hill's heart attack, his overall cardiac function returned to normal following an "appropriate" but unspecified period of convalescence and rehabilitation, and that there is no medical reason why Hill could not return to his employment as a truck driver. *See* Tr. at 132.

the company's policy pertaining to the receipt of speeding violations at the time the ticket was received.

Norman also testified that he has been involved in three accidents in Pitt-Ohio vehicles during his employment there. All three were described as "parking lot" accidents, and Norman noted that he had received a written letter of warning from the company pertaining to one of those accidents.

Norman has received two one-year safety awards from the company for the years in which he did not receive the speeding ticket or was not involved in the accidents described. Norman testified that he has never been caught or observed driving a Pitt-Ohio vehicle recklessly.

The second witness who falls within the non-protected class for both plaintiff's age and handicap claims was Gary Breeden. Breeden is thirty-eight years old and has been employed as a truck driver by the defendant for approximately six years. Breeden testified that he has learned of the defendant's safety policies through written letters, safety meetings and oral communications from the company's terminal manager, and that he received a copy of an April, 1989, safety policy from Pitt-Ohio which the company mailed to his home. That policy pertains to Pitt-Ohio's position on speeding and tailgating within any twelve-month period, and also sets forth the company's policy on reckless driving. *See* Plaintiff's Exhibit 6. The policy outlines various punishments which could be assessed for first through third offense speeding and tailgating violations occurring within any twelve-month period, and indicates, in addition, that reckless operation while operating a Pitt-Ohio vehicle carries a mandatory suspension, "subject to termination." *Id.*

Breeden testified that he has received four speeding tickets while driving Pitt-Ohio vehicles. Three of those tickets were received prior to the issuance of the April, 1989, speeding and tailgating and policy.[8] The fourth ticket was received approximately one year ago when he was cited for driving sixty-five miles per hour in a fifty-five mile per hour zone. A letter was written by the company's terminal manager in March, 1990, regarding Breeden's last violation which Breeden stated was to "help me beat the ticket." The letter indicated that Breeden had been under the terminal manager's employ for five years at that point and that he "has done an outstanding job with no problems whatsoever." Plaintiff's Exh. 7. Breeden testified that he was told by the terminal manager to throw the letter away when he was finished with it.

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[8]The first ticket was received, he estimated, the first year of his employment and was for going forty miles per hour in a thirty-five mile per hour zone. The second ticket was obtained in approximately 1987, and was for going sixty-five miles per hour in a fifty-five mile per hour zone. The third ticket was received "about three years ago," being approximately 1988, and was for going sixty-five miles per hour in a fifty-five mile per hour zone. *See* Tr. p. 73.

Breeden received a three-day suspension after turning in his last ticket. That ticket was the only one received by him after the issuance of the April, 1989, speeding and tailgating policy statement.[9] His punishment was more severe than that prescribed for first offense violations, which the policy specifies carries a one-day suspension for speeding violations greater than ten miles per hour over the posted limit. *See Plaintiff's Exh. 6.*

Breeden also testified that he has been involved in a few minor accidents in Pitt-Ohio vehicles, although such accidents were "non-chargeable" because they occurred without any fault on his part. No injuries were sustained in any of those accidents. Breeden noted further that he has received safe driving awards for the last four years, and has never been caught or observed driving a Pitt-Ohio vehicle recklessly.

Plaintiff's two remaining witnesses are both themselves over forty and are, like the plaintiff, members of the protected class on the age discrimination claim. Neither of those witnesses, however, has suffered a heart attack and their testimony is thus relevant to the disparate treatment aspect of plaintiff's handicap discrimination claim.

The first such witness, Richard Wayne Norman, is currently fifty-four years of age and has been employed by

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[9]As noted previously, the April 1989, policy pertains to speeding and tailgating "within any twelve month period" and there is no indication that Breeden received more than one violation in any one twelve-month period. *See* Plaintiff's Exh. 6. Moreover, although Breeden had received three other speeding citations, only the last one was received after the issuance of the stated policy.

the defendant for approximately five years. He was not hired by the defendant until he was fifty years of age. During the five year period in which Norman has been employed by the defendant, he has received one speeding ticket for driving twenty miles over the posted limit. He paid the ticket himself, and did not inform the company of the ticket at the time nor turn it in.[10]

Norman also testified that he has been involved in three accidents while driving Pitt-Ohio vehicles, the most recent of which was in 1989 or 1990. In one of those accidents, injuries were sustained. Both accidents were reported to the terminal manager, Fred Terwilliger, and resulted in the issuance of warning letters to Norman. No citation was given to him on the first accident, however, because he was not fund to be at fault. He was given a day off for the second accident in which he backed into a building.

Norman testified that he has received one safe driving award from Pitt-Ohio, and that he had received a favorable driving report from a road safety patrol on one occasion. Norman also testified that he had never been caught or observed driving recklessly in a company vehicle.

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[10]The witness stated that he did not turn it in at the time because he didn't think that was required.

The plaintiff also presented the testimony of Norman Hesson.[11] Hesson is forty-three years of age and has never had a heart attack. He has been employed as a truck driving for the defendant for approximately three years. Hesson has received three speeding tickets while driving Pitt-Ohio vehicles. The first two of those tickets, he testified, were received prior to the defendant's issuance of the April, 1989, policy on speeding and tailgating. No evidence was introduced to establish that Hesson received more than one of those tickets in any twelve-month period. On the third occasion, being the only one after issuance of the 1989 policy, Hesson received a ticket in October, 1989, for driving seventy-two miles per hour in a fifty-five mile per hour zone. Although the April, 1989, policy applicable in October, 1989, carried a penalty of a mandatory one-day suspension for first offense violations greater than ten miles over the posted speed limit, Hesson received a one-week suspension.[12]

Hesson has not been involved in any accidents while driving Pitt-Ohio vehicles. He also noted that the company

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[11]Because Hesson was unavailable to testify at the trial of action, his deposition was read into evidence by agreement of the parties.

[12]Plaintiff also questioned Hesson regarding the penalty prescribed by the April, 1989, policy for third offense speeding and tailgating upon citation by a police officer. Hesson testified that such a third offense speeding violation carried a penalty of immediate termination and that he had not been terminated. As previously observed, however, the policy covers speeding and tailgating "within any 12 month period," and there was no evidence that Hesson had received three violations within a twelve-month period. Moreover, only his third and last speeding violation came after the April, 1989, policy was issued.

takes a strict position on reckless driving, and that he has never been caught driving recklessly in company equipment.

Pitt-Ohio's terminal manager, Fred Terwilliger, also testified. According to Terwilliger, the decision to terminate the plaintiff was made by Pitt-Ohio's Safety Department in Pittsburg, Pennsylvania. Terwilliger recalled having spoken to Ron Uriah, the head of the company's Safety Department, regarding the Newkirk Driver's Violation Report prior to terminating the plaintiff's employment. He testified that the reason for Hill's termination was for the reckless operation of company equipment. Terwilliger testified that two other individuals, Steve Nester and Dennis Wiblin, were observed or cited for reckless driving while operating Pitt-Ohio equipment and that in both such instances those individuals, like the plaintiff, were terminated from their employment. Both of those individuals were under the age of forty and neither had suffered heart attacks.

III. *Analysis*

Before considering the merits of the defendant's substantive arguments, the standards for granting a motion for directed verdict should be enunciated. A directed verdict is properly entered when there is "no substantial evidence to support" a jury verdick in plaintiff's favor. *Business Development Corp. of North Carolina v. United States*, 428 F.2d 451, 453 (4th Cir.), *cert denied*, 400 U.S. 957 (1970). The Fourth Circuit has recognized that the central inquiry in resolving such motions is "not whether there is any evidence, but whether 'there are no controverted issues

of fact upon which reasonable men could differ.' " *Proctor v. Colonial Refrigerated Transportation, Inc.* 494 F.2d 89, 93 (4th Cir. 1974) *(quoting Pogue v. Retail Credit Co.*, 453 F.2d 336, 338 (4th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973).

Like the standard applicable to motions for judgment notwithstanding the verdict under Rule 50(b) of the Federal Rules of Civil Procedure, the court must ascertain whether, taking all of the evidence in the light most favorable to the plaintiff, there is sufficient evidence to support a verdict favorable to the plaintiff. *See, e.g., Herold v. Hajoca Corp.*, 864 F.2d 317, 319 (4th Cir. 1988), *cert. denied.*, 490 U.S. 1107 (1989); *Wilhelm v. Blue Bell, Inc.*, 773 F.2d 1429, 1433 (4th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986). Evidence which is sufficient to support a jury's verdict must be more than a scintilla, and inferences drawn by the jury must be "reasonable probable" rather than merely speculative or based upon a mere "possibility." *See, e.g., Austin v. Torrington Co.*, 810 F.2d 416, 420 (4th Cir.), *cert. denied*, 484 U.S. 977 (1987); *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 241-42 (4th Cir. 1982).

In *Lovelace v. Sherwin-Williams*, the Fourth Circuit considered in detail the standard by which the sufficiency of the evidence on the ultimate motivational issue in a federalk age discrimination case should be assessed. The court held that "reasonable probability" is the proper test in determining the sufficiency of circumstantial evidence in a case such as this, reasoning:

> This emphasis, where causation is dispositive, upon . . . "reasonable probability" . . . rather than mere "possibility" as the proper test simply

> bespeaks the special danger that in a matter so generally incapable of certain proof jury decision will be on the basis of sheer speculation, ultimately tipped, in view of the impossibility of choosing rationally between mere "possibilities," by impermissible but understandable resort to such factors as sympathy and the like. It is of course precisely to guard against this danger that the burden of producing rationally probative evidence—and the corresponding risk of nonproduction—is placed upon claimants and subjected to the ultimate jury control devices of directed verdict and judgment n.o.v.

681 F.2d at 342, *citing Brady v. Southern Railway Co.*, 320 U.S. 476, 480 (1940); *Galloway v. United States*, 319 U.S. 372, 395 (1942).

In order to make a *prima facie* case of employment discrimination on the plaintiff's state age and handicap claims, plaintiff was required to prove, by a preponderance of the evidence that (1) he was a member of the protected class, (2) that he was discharged or suffered from some other adverse decision with regard to his employment, and (3) that, but for his age or handicap, he would not have been discharged. *Conaway v. Eastern Association Coal Corp.*, 358 S.E.2d 423 (W. Va. 1986). There is no dispute between the parties that the plaintiff satisfied the first two elements of his *prima facie* case. As to the third element, however, the court finds that the plaintiff introduced no evidence to support that aspect of his *prima facie* case and that the defendant's motion for directed verdict must be granted.

In making this determination, it is observed that, in *Conaway v. Eastern Associated Coal Corp.*, West Virginia's Supreme Court of Appeals acknowledged that direct proof will seldom be available with regard to the third and motivational element of a plaintiff's *prima facie* case and that such direct proof is unnecessary. The plaintiff has not suggested that any such direct proof was available here. As noted in *Conaway*, however, the plaintiff may make his *prima facie* case by introducing circumstantial evidence which sufficiently links the defendant's decision and the plaintiff's status as a member of the protected class so as to give rise to an inference that the employment decision was based upon illegal discriminatory criteria. 358 S.E.2d at 429. The court observed:

> This evidence could, for example, come in the form of an admission by the employer, a case of unequal or disparate treatment between members of the protected class and others by the elimination of the apparent legitimate reasons for the decision, or statistics in a large operation which show that members of the protected class received substantially worse treatment than others.

Id. at 430.

Here, the plaintiff relied upon the testimony of four Pitt-Ohio employees in an attempt to show alleged disparity of treatment between the plaintiff and other non-members of the protected class, and to show that the plaintiff received substantially worse treatment than those individuals due to his age and handicap. When the evidence proffered in that regard is carefully viewed in the light most favorable to the

plaintiff, it is seen that no such disparity of treatment was shown in the present case.

Two of plaintiff's four witnesses on the disparate treatment aspect of the case—Richard Wayne Norman and Norman Hesson—are themselves members of the protected class for age discrimination. Although neither has suffered a heart attack, the court concludes that the testimony of neither was sufficient to support a finding of disparate treatment with regard to that aspect of the plaintiff's claim. Specifically, Richard Norman has received only one speeding ticket in his tenure with Pitt-Ohio which was not reported to the company. The one accident which he testified he had been involved in and which resulted in injuries to the passenger of the other vehicle was not his fault and did not result in the issuance of any citations to him. Consequently, the absence of any punishment by the defendant as a result of that incident fails to support any claim of disparity as alleged by the plaintiff. As to the one accident in which he backed into the building, Norman testified that he received a one-day suspension from work. The plaintiff introduced no evidence to suggest that such suspension was in any way inconsistent with company policy.

The other witness who was in the protected class for handicap but not age, Norman Hesson, has received three speeding tickets, including the most recent for which he was cited for traveling more than ten (10) miles over the posted speed limit. The evidence showed, however, that only Hesson's last ticket was received after the issuance of the defendant's April, 1989, policy on speeding and tailgating, and that he actually received a more severe penalty than

that called for in the policy. Thus, plaintiff's attempt to draw the inference that Hesson received more favorable treatment for driving violations than did the plaintiff is without any basis in fact.

Evidence received from plaintiff's two remaining witnesses on the disparate treatment aspect of the case are similarly insufficient to make plaintiff's required *prima facie* case of discrimination on either the state age or handicap theories. Paul Norman, who replaced the plaintiff on his "city route," had received one ticket for going in excess of ten (10) miles over the posted speed limit without having received a warning or suspension. No evidence was proffered by plaintiff, however, to establish when that ticket was received or whether the absence of punishment was inconsistent with company policy at the time the ticket was issued. The remaining witness, Gary Breeden, has received four speeding violations, no two of which were shown to have occurred in any one twelve-month period. Only the last of Breeden's tickets came after the issuance of the company's April, 1989, policy pertaining to speeding and tailgating within any twelve-month period. Breeden was suspended for three-days after his last violation, which was his first after issuance of the company's April, 1989, policy, and which violation did not occur within twelve months of his receipt of any prior violations. The punishment received by Breeden was actually greater than that prescribed for first offense violations under the company's speeding and tailgating policy.

Based upon a careful review of the testimony elicited from each of these individuals regarding prior speeding violations and accidents in Pitt-Ohio vehicles, the court

concludes that there is simply no basis in fact to support plaintiff's position that members of the non-protected classes on either plaintiff's state age or handicap claims received more favorable treatment than did the plaintiff. Indeed, two of the four witnesses called by the plaintiff actually received somewhat more harsh treatment for driving violations than called for in the company's speeding and tailgating policy applicable at the time the violations occurred.

More fundamentally, however, the plaintiff failed to introduce any evidence whatsoever to establish that he received less favorable treatment in response to the company's determination that he had violated the policy on reckless operation of company equipment than other Pitt-Ohio employees who the company also determined were observed or cited for driving recklessly. To the contrary, the evidence showed that no Pitt-Ohio employees who had been cited for or observed driving recklessly had been retained in their employment. Indeed, the two individuals who were observed driving recklessly in company equipment and who were members of the non-protected classes for both plaintiff's state age and handicap claims were, like the plaintiff, discharged from their employment.[13]

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[13]Interestingly, it is further observed, as earlier noted, that the plaintiff has not stated that he denied the factual assertions in the Newkirk report at the time it was presented to him by the defendant's terminal manager, nor did he exercise his right to file a grievance with the company to contest the accuracy of those charges.

Taken in its totality and when viewed in the light most favorable to the plaintiff, the court further concludes that, for the same reasons indentified in conjunction with his state age and handicap claims, plaintiff's federal ADEA claim likewise fails inasmuch as plaintiff did not prove, with reasonable probability, that his age was a determining factor in the defendant's decision to terminate his employment.[14]

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[14]In the context of the ADEA, the plaintiff must prove, with reasonable probability, that but for the age of the plaintiff, the employment decision adverse to him would not have been made. Age must have been a determining factor. *See Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1417 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 429 (1991), *citing Lovelace v. Sherwin- Williams*, 681 F.2d 230, 239 (4th Cir. 1982).

Supreme Court, U.S.
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No. 92-1814

In The

Supreme Court of the United States

October Term, 1992

DANNY LEE HILL,

Petitioner,

vs.

PITT-OHIO EXPRESS, INC., a Pennsylvania Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the District Court's directed verdict was clearly wrong when there was absolutely no evidence presented to show that non-members of a protected class were treated less severely than Plaintiff for the same or similar conduct.

The questions presented by the Petitioner for review by the Court on writ of certiorari are inappropriate under the criterion outlined in Rule 10 of the Supreme Court Rules. All of the Petitioner's questions presented hinge around the sufficiency of the evidence presented at trial and whether said evidence was sufficient to withstand a directed verdict.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Procedure.

The Plaintiff filed this action on October 9, 1990 in the Kanawha County Circuit Court in Charleston, West Virginia. The complaint alleged age and handicap discrimination in violation of West Virginia Code § 5-11-9, 29 U.S.C. § 621 and 29 U.S.C. § 701. The Defendant then removed the action to the Federal District Court in the Southern District of West Virginia (hereinafter the "court") pursuant to 28 U.S.C. § 1441(b).

This action originally included Ron Uriah as a Defendant, however, the court ruled on Defendant's motion for summary judgment that as a matter of law Ron Uriah should not be a party to the action since he had not been named as a party in Plaintiff's original complaint to the West Virginia Human Rights Commission. However, the court denied a summary judgment motion pertaining to the Defendant, Pitt-Ohio Express, Inc.

This matter proceeded to trial on November 7, 1991 (a first trial ended in a mistrial). At the conclusion of the Plaintiff's case, the Defendant made two motions for directed verdict. In the first motion, the Defendant argued that Plaintiff had failed to introduce any evidence that he met the definition of "handicapped" under West Virginia Code § 5-11-9. The court ultimately denied this motion.

In the Defendant's second motion for a directed verdict, the Defendant argued that the Plaintiff failed to meet its burden of proof in that he failed to introduce any evidence to the effect that the Plaintiff would not have been discharged but for his age. The court deferred ruling on this motion and the Defendant renewed its motion for a directed verdict at the end of all the evidence. The court further deferred ruling on the motion until after the jury returned with the verdict. The jury returned a verdict for the Plaintiff on November 8, 1991. However, the court thereafter granted the Defendant's remaining motion for directed verdict and issued a final judgment order in Defendant's favor dated December 26, 1991. The Plaintiff appealed this final judgment order to the Fourth Circuit Court of Appeals which affirmed the lower court's ruling by order entered August 7, 1992. It is from this decision that the Plaintiff (Petitioner) brings on its petition for writ of certiorari.

B. Statement of Facts

The Defendant, Pitt-Ohio Express, Inc. (Respondent), is a Pennsylvania Corporation doing business in the State of West

Virginia. The Plaintiff (Petitioner), Danny Lee Hill, was employed by the Defendant in 1986 as a truck driver. At the time that the Plaintiff was hired he was 40 years old and already a member of a protected class. On July 3, 1991, the Plaintiff had a heart attack and was away from work for approximately five (5) weeks. Upon the Plaintiff's return to work, he was assigned a City of Charleston delivery route.

On October 18, 1989, the Plaintiff had finished his city route a little early and was asked to make a special trip to Huntington. On October 27, 1989, the Plaintiff was terminated from his position with the Defendant by Fred Terwillinger, the Defendant's terminal manager. This termination was due to a driver's violation report which was a result of observations by Sherry Newkirk, an employee of Safety Service, Inc. The report described observations made by Sherry Newkirk of the Plaintiff traveling at 73 miles per hour in a 65 mile per hour zone under conditions of light rain and moderate traffic. Mrs. Newkirk also observed that the Plaintiff followed traffic at a distance of 20 feet for approximately three miles before passing and did not use his left turn signal upon changing lanes. These observations occurred during Plaintiff's October 18, 1989 trip to Huntington, West Virginia.

The Plaintiff himself acknowledged that if someone were operating a vehicle in the manner as described in the Driver's Violation Report that it would constitute operation of the vehicle in a dangerous manner. The Plaintiff also acknowledged that he did not file a grievance with the company concerning its decision to terminate him nor did he appeal the decision to the company.

Prior to this incident, the Plaintiff was involved in one minor accident while employed with the Defendant and had not received any speeding tickets.

In an attempt to establish his *prima facie* case of employment discrimination, the Plaintiff introduced at trial the testimony of four Pitt-Ohio employees which were evidently presented in an attempt to show a disparity of treatment accorded to non-members of the protected class and contrasted to the treatment of the Plaintiff. The first witness presented by the Plaintiff was Richard Wayne Norman. Mr. Norman was employed by the Defendants for almost five (5) years as a truck driver. Mr. Norman testified that he received one speeding ticket during his tenure with the Defendant. Mr. Norman is himself a member of the protected class since he was 54 years old at the time of trial. Mr. Norman paid the speeding ticket and did not inform the company at the time. Mr. Norman testified he had two or three accidents while employed by the Defendant. He reported this accident to the terminal manager, Fred Terwilliger. Mr. Norman received warning letters concerning the accidents. He received a day off for one accident in which he backed into a building. Mr. Norman testified that he had never been caught or observed in reckless driving. Mr. Norman did not testify as to what policies were in effect at the time of these accidents or speeding tickets. He also did not testify as to the precise dates of the accidents.

A second witness introduced by the Plaintiff was Norman Hesson. Mr. Hesson was hired by the Defendant in approximately 1988. He testified that he had never had an accident while employed with Defendant and had received three speeding tickets. He further testified that he received the last speeding ticket to the best of his memory sometime in October, 1989 and that he informed the terminal manager of this speeding ticket. He testified that he received a suspension of one (1) week because of this ticket. Mr. Hesson is also a member of the protected class in that he was 43 at the time of this trial. Mr. Hesson testified that he has never been caught driving company equipment recklessly and that the company took a very strict position on reckless driving. He also testified that two of his speeding tickets occurred prior to a policy

memorandum issued by the Defendant concerning three offenses for speeding within a twelve (12) month period. There was no testimony elicited from Mr. Hesson to establish that his three speeding tickets occurred within a twelve (12) month period.

A third witness, Mr. Paul Norman, testified on behalf of the Plaintiff. Mr. Norman had at the time of trial been employed by Defendant for about six (6) years. Mr. Norman was twenty-six (26) years old at the time of trial. Mr. Norman was assigned the City of Charleston route after the Plaintiff was terminated. During the time Mr. Norman was employed with Defendant, he had received one speeding ticket which he reported to the Defendant. No testimony was received from Mr. Norman to establish when he received the speeding ticket. Mr. Norman did not receive any kind of letter of suspension or other punishment as a result of this ticket. There was no testimony elicited from Mr. Norman concerning the company policy in effect at the time he received this ticket. Mr. Norman also testified that he had been involved in three accidents since being employed by Defendant and he received a warning letter on one of these accidents. All three accidents were described as "parking lot" incidents. Mr. Norman testified that he had never been caught or observed driving a company vehicle recklessly.

The fourth witness presented by the Plaintiff in an attempt to show disparity of treatment was Gary Breeden. At the time of trial, Mr. Breeden had been employed by Defendant for six years and one month. Mr. Breeden testified that he had received four speeding tickets since he had been employed by Defendant. Mr. Breeden testified that he was thirty-eight (38) years old at the time of trial. Mr. Breeden received a three day suspension for the last speeding ticket. Mr. Breeden testified that he had never had an accident in Defendant's vehicles that was chargeable. Only one of Mr. Breeden's speeding tickets was received after the April, 1989 speeding and tailgating policy statement. Mr. Breeden testified that he had never been caught or observed driving Defendant's vehicle recklessly.

The Defendant's terminal manager, Fred Terwilliger, also testified for the Plaintiff. Mr. Terwilliger testified that the decision to terminate the Plaintiff was made by the Defendant's safety department in Pittsburgh, Pennsylvania. Mr. Terwilliger testified that the Plaintiff was terminated for reckless operation. Mr. Terwilliger testified that two other individuals, Steve Nester and Dennis Wiblin, were terminated by the Defendant for reckless driving and both of those individuals were under the age of forty (40) and neither had suffered heart attacks.

REASONS FOR DENYING THE WRIT

The Plaintiff (Petitioner) alleged in the trial of this action that he was discriminated against because of his age and handicap by his employer (the Respondent). In order to establish a *prima facie* case for such employment discrimination the Plaintiff was required to establish at trial, by a preponderance of the evidence the following three elements:

1. He was a member of the protected class;

2. That the Defendant made an adverse decision concerning Plaintiff; and

3. That, but for Plaintiff's protected status, said adverse decision would not have been made.

Conoway v. Eastern Associated Coal Corp., 358 S.E. 2d 423 (W. Va. 1986); *State ex rel., Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc.*, __ W. Va. __, 329 S.E. 2d 77 (1985).

The Petitioner states in his petition for writ of certiorari that the Defendant does not dispute that the Plaintiff met his burden as to the first two elements mentioned above. At the trial, the

Defendant did dispute one or more of these elements, however, the Defendant (Respondent) admits as it pertains to the motion for directed verdict, the first two elements of this *prima facie* test are not at issue.

As to the third element of his *prima facie* case at the trial of these matters, the Plaintiff did not offer any direct proof that but for his age and handicap he would not have been discharged. However, the West Virginia Supreme Court of Appeals in *Conoway v. Eastern Associated Coal Corp., supra,* at 429 has recognized that direct proof is seldom available in such cases and that evidence sufficient to create certain inferences will be acceptable in proving the third element. These inferences can be established by introducing evidence which would sufficiently link the Defendant's decision to terminate the Plaintiff and the Plaintiff's status as a member of the protected class. The court in *Conoway* observed:

> The evidence could, for example, come in the form of an admission by the employer, a case of unequal or disparate treatment between members of the protected class and others by the elimination of the apparent legitimate reasons for the decision or statistics in a large operation which show that members of the protected class received substantially worse treatment than others.

These elements, which the Plaintiff must prove by a preponderance of the evidence, go to the heart of an unlawful discrimination case. "The ultimate in the area of disparate disciplinary treatment has been found generally as follows: Whether members of a protected group were accorded different treatment than non-members engaged in similar activity." *State ex rel. Human Rights Commission v. Logan-Mingo Area Mental*

Health Agency, Inc., __ W. Va. __, 329 S.E. 2d 77, 85 (1985), *quoting Burdette v. F.M.C. Corp.*, 566 F. Supp. 808, 815 (N.D. W. Va. 1983).

Therefore, in order to establish the third element of his *prima facie* case, the Plaintiff must have introduced evidence of this disparity in treatment. It is this disparity in treatment that creates the inference that but for the Plaintiff's protected status he would not have been fired. The Plaintiff seems to skip by this issue in his petition for writ of certiorari but this issue is the crux of this case and the very issue addressed by the District Court in its memorandum order granted Defendant's motion for directed verdict. The Plaintiff spends a considerable amount of time in its petition discussing the shifting of burden once a *prima facie* case has been established. The Plaintiff goes on to argue that the District Court engaged in impermissible weighing of the facts in deciding that the Defendant's legitimate business reasons for the Plaintiff's termination of employment was more credible than the Plaintiff's evidence showing mere pretext. The Plaintiff clearly misses the mark in this analysis. This has nothing to do with this case or the District Court's ruling in its December 26, 1991 memorandum order. The issue of Defendant's legitimate business interest contrasted to Plaintiff's assertion of mere pretext never comes up in employment discrimination analysis until a *prima facie* case has been established.

> In an action to redress unlawful discriminatory practices in employment and access to place[s] of public accommodations under the West Virginia Human Rights Act, as amended, W. Va. Code 5-11-1, et seq., the burden is upon the complainant to prove by a preponderance of the evidence a prima facie case of discrimination .... *If the complainant is successful in creating this rebuttal*

> *presumption of discrimination, the burden then shifts to the respondent to offer some legitimate and non-discriminatory reason for the rejections.* Should the respondent succeed in rebutting the presumption of discrimination, then the complainant has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext in the unlawful discrimination.

Shepardstown V.F.D. v. W. Va. Human Rights Commission, __ W. Va. __, 309 S.E. 2d 341 (1983) (emphasis added).

The District Court never got to the second part analysis of weighing the legitimate business reason and the mere pretext arguments because it ruled that the Plaintiff had failed in its attempt to provide any evidence to prove that but for the Plaintiff's protected class status he would not have been terminated. The Plaintiff attempted to provide this inference by presenting testimony allegedly to show members of the non-protected class received more favorable treatment. The District Court found that the Plaintiff failed in this endeavor. Therefore, the analysis in evaluating the petition for writ of certiorari should be whether the District Court was clearly wrong when ruling the Plaintiff had not met its *prima facie* evidentiary burden in establishing the inference that but for Plaintiff's protected status he would not have been terminated. *Brown v. Reardon*, 770 F.2d 896 (10th Cir. 1985). More specifically, did the Plaintiff present sufficient evidence to prove unequal or disparity of treatment between non-members of the protected class and the Plaintiff. Clearly, the evaluation of the sufficiency of the evidence is not a question for this Court and does not come close to meeting the standards enumerated in Rule 10 of the United States Supreme Court Rules.

The case of *Lovelace v. Sherwin William Co.*, 681 F.2d 230 (4th Cir. 1982), presents the standard upon which it is decided whether the Plaintiff has presented enough evidence as to said inference to survive a motion for directed verdict. The court held that "reasonable probability" is the proper test in determining the sufficiency of circumstantial evidence in a case such as this by stating:

> This emphasis, whether causation is dispositive, upon . . . "reasonable probability" . . . rather than mere "possibility" as the proper test simply bespeaks that special danger that in a matter so generally incapable of certain proof jury decision will be on the basis of sheer speculation, ultimately tipped, in view of the impossibility of choosing rationally between mere "possibilities: by impermissible but understandable resort to such factors as sympathy and the like. It is, or course, precisely to guard against this danger that the burden of producing rationally probative evidence . . . and the corresponding risk of non-production . . . is placed upon the claimants and subjected to the ultimate jury control devices of directed verdict and judgment n.o.v.

681 F.2d at 242, *citing Brady v. Southern Railway Co.*, 320 U.S. 476, 480 (1940); *Galloway v. United States*, 319 U.S. 372, 395 (1942).

In the case at hand, not only was there an absence of sufficient evidence to make the inference that the Plaintiff would not have been discharged but for his protected status reasonably probable, there was *no* such evidence tendered. The Plaintiff presented no evidence to establish that other employees of the Defendant who

were not members of the protected class were not disciplined, or where disciplined less severely, than the Plaintiff, though both engaged in similar conduct. If there is a complete absence of probative facts to support particular inferences, or if facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonableness could not arrive at but one verdict, the court may bypass the jury. *Nunez v. Superior Oil Co.*, 572 F.2d 1119, *rehearing denied*, 577 F.2d 1134, *appeal after remand*, 644 F.2d 534.

All four of the Plaintiff's witnesses presented to show alleged disparity of treatment testified that they had never been caught or observed operating Defendant's equipment recklessly. This is precisely the conduct for which Plaintiff was discharged. The Plaintiff simply produced no evidence of similar conduct by the witnesses she presented. In contrast, Fred Terwilliger testified that two other individuals who were not members of the suspect class were observed driving recklessly in company equipment and were discharged. The Plaintiff offered no evidence to dispute this. The Petitioner argues that this testimony lacked credibility. However, even if this is true, this does not diminish the fact that the Petitioner presented no affirmative evidence of disparate treatment. The Plaintiff offered no evidence of any other individual who was not a member of the suspect class who was observed driving recklessly in Defendant's equipment but was not fired. The Plaintiff simply has not met its burden in this regard.

The Plaintiff attempts to make his case on the assertion that the four witnesses presented were engaged in similar conduct by virtue of having been involved in accidents and having received speeding tickets with a corresponding failure by Defendant to abide by its written policy applicable thereto. First of all, these incidents are simply not similar conduct. The culpability of the Plaintiff and the severity of the reckless driving obviously makes it potentially damaging to Defendant and dissimilar to a routine speeding ticket or unintentional accident.

The Petitioner adds a new creative twist to his argument by arguing that West Virginia state regulations setting forth West Virginia's numerical point system for penalties for driving/traffic violations should be utilized to establish "same or similar conduct" in a federal discrimination case. However, the Petitioner cites no authority for this proposition, because there is none.

Secondly, the Plaintiff presented no evidence to show that the four employees of Defendant were treated less severely than the appropriate company policy. Richard Norman stated that he had one speeding ticket while employed by Defendant and he did not report the same to the Defendant. The one accident that he was involved in that he was at fault he received a one day suspension and Plaintiff failed to introduce any evidence that this was contrary to established company policy.

Norman Hesson testified that he had only received one speeding ticket after the April 1989 policy on speeding and tailgating and that he received a one week suspension for the same which was more severe than called for in the applicable policy.

It is interesting to note that the above two witnesses are themselves members of a protected class in that they each are over forty years of age. It is the Defendant's position that these two witnesses do not meet the evidentiary requirement of being non-members of a protected class.

Paul Norman testified that he received one speeding ticket but did not testify when the ticket was received or if his punishment or lack thereof was contrary to established company policy. The testimony of Gary Breeden also did not establish that he had been treated more favorably than company policy. He testified that he had received four speeding tickets, no two of which were shown to have occurred in any one twelve month period. Only the last of Breeden's tickets came after the issuance of the company's April,

1989 policy pertaining to speeding and tailgating and the evidence showed that Breeden actually received punishment greater than prescribed for first offense violations under the Defendant's speeding and tailgating policy.

The Plaintiff simply did not present any evidence that other employees of Defendant which were not members of a protected class were treated more favorably for similar conduct than Plaintiff nor did he present evidence that Defendant violated its own policies in its treatment of employees who were not members of a protected class.

Finally, the Plaintiff argues in its brief that the court erred in not allowing the introduction of a memorandum dated October 30, 1989. The court ruled that the document was irrelevant. The Plaintiff argues that this document has relevance in proving pretext. However, if so, it certainly was harmless error. As stated before, the district court ruled that the Plaintiff did not meet his evidentiary burden in establishing a *prima facie* case for employment discrimination. Pretext only comes into the analysis after the burden has been met. Therefore, this element is clearly irrelevant to the discussion of the appropriateness of the District Court's ruling.

CONCLUSION

For the above stated reasons, it is clear that Plaintiff did not present a *prima facie* case of age or handicap employment discrimination. The Plaintiff failed to introduce any direct evidence or circumstantial evidence that would lead to the inference that but for his age and handicap he would not have been discharged. Therefore, the third element of the Plaintiff's case has not been established even when looking at all the evidence in a light most favorable to the Plaintiff. The Plaintiff (Petitioner) has certainly not shown that the District Court's decision was clearly wrong.

Also, the Plaintiff has not shown how the October 10, 1989 memorandum that the District Court ruled irrelevant is relevant to this action.

Finally and most importantly, the Petitioner simply does not present a unique or unsettled issue that would fit within the criteria established by Rule 10 of the United States Supreme Court Rules.

Based upon all of the foregoing authorities and argument, Danny Lee Hill's petition for writ of certiorari should be denied.

Respectfully submitted,

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